

Memorandum

TO: SUNSHINE REFORM
TASK FORCE

FROM: BOARD OF ADMINISTRATION FOR
THE POLICE AND FIRE
DEPARTMENT RETIREMENT PLAN
AND BOARD OF ADMINISTRATION
FOR THE FEDERATED CITY
EMPLOYEES RETIREMENT
SYSTEM

SUBJECT: **Sunshine Reform
Task Force
Recommendations**

DATE: April 12, 2007

On April 5 and April 12, 2007, the Boards of Administration for the Police and Fire Department Retirement Plan and the Board of Administration for the Federated City Employees Retirement System respectively, heard a presentation from the City Manager's Office and the City Attorney's Office regarding the draft recommendations of the Sunshine Reform Task Force. The Boards directed their staff and legal counsel to prepare a draft response from the retirement plan perspective. A copy of the draft response is attached.

The Boards of Administration are trustees of the City's two pension plans: the Police and Fire Department Retirement Plan and the Federated City Employees Retirement System. Under both the California Constitution and the San José Municipal Code, the Boards are charged with the sole and exclusive authority for the investment of the assets of the retirement funds and the administration of the retirement systems. With these duties the Boards come the fiduciary responsibilities of trustees. These include fiduciary responsibilities to administer the retirement systems in a manner that will assure prompt delivery of benefits and related services to the participants and the beneficiaries; to hold the assets in trust for the exclusive purposes of providing benefits and defraying the reasonable expenses of administering the systems; and to invest and diversify the assets so as to minimize the risk of loss and maximize the rate of return.

The Boards appreciate the presentations by the City Manager's Office and the City Attorney's Office and the opportunity to comment on the Task Force's draft. The Boards will continue to review the recommendations as they come forward. It is anticipated that there will be continued discussions at the Boards' regularly scheduled meetings of May 3 and May 10 and that the Boards will consider the attached draft then.

THOMAS J. WEBSTER
Acting Director of Retirement Services

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Boards of Administration Draft Review of Summary of Current Recommendations and Outstanding Issues
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I. Public Meetings

The Task Force has made the following recommendations:

Recommended Provision	Concerns
A. Definitions	
1. Policy Body	
<p>A. City Council, Redevelopment Agency Board, Finance Authority, Clean Water Financing Authority, Parking Authority, all committees/bodies of the City Council or Agency Board, whether permanent or temporary, decision-making or advisory.</p>	
<p>B. All boards, commissions or other bodies established by City Charter or created by ordinance, resolution, or other formal action by the boards listed above.</p>	<p>The Retirement Boards are subject to the Brown Act. However, unlike other boards and commissions, the Retirement Boards invest and administer trust funds, have fiduciary obligations with respect to the trust funds and to the participants and beneficiaries of the plans, must administer the plans for the exclusive benefit of the participants and beneficiaries, and are subject to special Internal Revenue Code rules relating to government retirement plans. Therefore, the designation of the Retirement Boards as policy bodies for the purposes of the Task Force recommendations has particular implications for the Boards. It is suggested that the Boards be excluded from the Task Force recommendations to the extent the Boards adopt their own policies on the subject. A number of the Task Force recommendations may adversely affect the Boards' ability to provide benefits promptly or perform other fiduciary duties.</p>

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C. Committees of Council staff that represent a quorum of the City Council.	
D. Any body created by a policy body that exists primarily to exercise authority delegated to it; or receives City funds and has on its governing board a member of a policy body or designee with voting rights.	This provision appears to apply to the Retirement Boards' Investment Committees and Real Estate Committees. As such, some of the Task Force recommendations could have an adverse effect on the Boards' investments.
E. Any body that grants or advises a policy body or department head on grants where the aggregate amount of funds total more than \$200,000 in City funds or San José Redevelopment Agency funds per City fiscal year.	

Recommended Provision	Concerns
2. Ancillary Body	
A. Committees or other bodies created by and to serve as an advisor to a member of a policy body, the Mayor, a City Councilmember, the Mayor's Chief of Staff, the Mayor's Budget and Policy Director, the City Manager, the City Attorney, the City Clerk, the City Auditor, the Independent Police Auditor, the Executive Director of the San José Redevelopment Agency or a Department Head.	It is not clear whether this would apply to an ad hoc committee of a Board where the ad hoc committee is formed to study an issue and report on the matter to the full Board as opposed to a single member of the Board.
B. Ancillary body does not include any committee or body that consists solely of City staff.	

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3. Non-governmental and Non-City Government Body	
A board or multimember body that governs any for-profit entity, non-profit entity, or non-City governmental body that exercises authority over City services that has been delegated to it by a policy body and receives more than \$200,000 in City or San José Redevelopment Agency funds per City fiscal year.	It is not clear what is meant by “exercises authority over City services”. This is not appropriate if it is intended to apply to investment managers, actuaries, custodian banks or other consultants to the Boards.

Requirements for Policy Bodies, and Ancillary Bodies (extending beyond current practice or the Brown Act)

	Policy Body	Ancillary Body	
1. Agenda Posting	10 calendar days	4 calendar days	<p>The Retirement Boards meet on a monthly basis rather than a weekly basis. This requirement can adversely affect the prompt delivery of benefits to participants and beneficiaries because if applications are not received in time to process them for the 10-day requirement, the applicants would have to wait another month and benefits would be delayed. This can be particularly burdensome in those cases where situations arise after the 10-day requirement (e.g., the death of a member and the need to determine survivorship benefits for the surviving spouse and/or children).</p> <p>This requirement could also have an adverse effect on the trust fund investments. The Boards frequently have no control over situations that may require prompt action to protect the trust assets.</p>

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2. Staff Reports	10 calendar days	4 calendar days	This recommendation can have an adverse effect on the ability to provide benefits promptly. In some cases additional information is submitted by the applicant after the hearing date has been set. Because the Boards meet on a monthly basis, in those cases where the additional submittal necessitates additional staff analysis, the 10 day requirement could result in delaying the hearing on the application for another month.
3. Staff Reports – Expenditures of \$1M or More	14 calendar days	4 calendar days	It is not clear what is meant by “expenditures”. Does this apply to investments of trust funds? If so, this requirement could result in lost opportunity costs.
4. Supplemental Staff Reports	5 calendar days	2 calendar days	This requirement raises the same concerns as are expressed above.
5. Council Memos	3 business days	2 business days	
6. Agenda Posting (Special Meeting)	4 calendar days	24 hours	This requirement could have an adverse effect on investments, particularly in cases where the Board needs to take action immediately. For example, if the Board receives notification an investment manager has been ordered by the SEC to suspend operations, the Board would need to take immediate action to preserve the assets under that investment manager’s charge.

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7. Recording and Photography	<p>City Council, Rules and Open Government Committee, Planning Commission and other Quasi-judicial bodies must video record meetings; all other Policy Bodies must audio record meetings; Recordings to be kept for 2 years.</p>	<p>Audio record meetings or provide action minutes Recordings to be kept for 2 years.</p>	<p>The Retirement Boards serve in a quasi-judicial manner when they hear applications for service or disability retirements. Video recording of these hearings raises serious concerns about the effect on the applicants. It also raises serious concerns about the safety of the public employees, particularly law enforcement officers and Code Enforcement officers, who appear at the hearings and who may then be identified through the televising of the recordings. The President of the San Jose Police Officers Association has emphatically objected to this requirement, stating that this practice could imperil law enforcement officers.</p> <p>The Retirement Boards currently have audio recording equipment in the Boards' meeting room but they do not have video recording equipment. Installation of such equipment can be expensive. Because video recording is not necessary for the proper administration of a retirement system, it may be that the costs for the lease or purchase of such equipment and its maintenance would not be an appropriate expenditure of trust funds. An alternate source of funding may be necessary. It has not proven practicable for the Boards to meet at City Hall; there is a limited number of rooms equipped for</p>
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			<p>video recording and the Boards have had situations where they were bumped from those rooms at the last minute even though their meetings were scheduled well in advance. This is particularly the case during Council budget sessions.</p> <p>In addition, this recommendation is contrary to the Retirement Services Retention Schedule which requires audio tapes of Board meetings to be retained on a permanent basis.</p>
8. Public Testimony	Up to 4 minutes may be extended to a representative of an organization to provide public testimony if: 1) two or more members are in attendance, and 2) one representative is willing to yield his or her time.	Brown Act	The Retirement Boards do not want to limit testimony from participants, beneficiaries or persons who represent them except in those cases where it is in the best interest of the participants to do so (e.g., where a large number wish to speak). For some participants, the Board meeting is the only opportunity to address the Boards.
9. Minutes	Current practice for Council meetings extended to all Policy Bodies; minutes provided no later than 10 days after the meeting.	Action minutes or audio recording	The audio recordings of the Boards are available within a few days of the meeting. However, the minutes are not official until they have been approved by the respective Board. Because the Boards only meet monthly, it is impossible for the Boards to approve the minutes within the recommended timeframe unless they hold special meetings for that purpose.

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Recommended Provision	Concerns
C. Requirements for Non-City Governmental Body and Non-City Government Body	
<p>2. Every non-governmental and non-City governmental body must: 1) be assigned to a policy body that has oversight over the body, and 2) make any decision about policy issues in the form of a recommendation to the assigned policy body.</p> <p>a. Every new or renewed contract with a non-governmental or non-City governmental body must include a provision that the non-governmental or non-City governmental body agrees to comply with the terms of this section.</p> <p>b. Every non-governmental and non-City governmental body must be assigned to a policy body that has oversight over the non-governmental or non-City governmental body.</p> <p>c. When a non-governmental or non-City governmental body makes any decision about a policy issue that would have been made by a policy body if the authority had not been delegated to the non-governmental or non-City governmental body, it must do so in the form of a recommendation to the policy body that has oversight over the non-governmental or non-City governmental body. The non-governmental or non-City governmental body may implement the recommendation about the policy issue only if the policy body approves the recommendation.”</p>	<p>Except for item b where the assignment is to the Boards, these requirements are inappropriate if they are intended to apply to an investment manager, actuary, custodian bank, or other consultant to either Board. Applying this requirement to investment managers or the custodian bank would delay investment transactions and interfere with the Boards’ exclusive authority to invest the assets of the trusts. In addition, applying these requirements to the actuaries or other consultants may adversely interfere with the Boards’ exercise of their fiduciary duties, the prompt delivery of benefits, and the investment of the funds.</p>
<p>3. Policy issues include, but are not limited to: adoption of or amendments to budgets; levels of service; allocation of services to different areas or populations; number and qualifications of staff; maintenance and preservation of public facilities and/or property; any decision that may place the City or the public at risk of financial loss, property damage or personal injury.</p>	<p>To the extent that these are functions within the jurisdiction of the Boards, they are within the sole and exclusive authority of the Boards. Applying these policies to these functions would interfere with the fiduciary duties of the Boards.</p>

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Recommended Provision	Concerns
D. Other Public Meeting Provisions (approved by SRTF 4/5/07)	
1. The Task Force recommended the following agenda requirements when a policy body reports to a policy: the item should go through at least 2 ten-day noticing periods (i.e. 10 days notice for Council Committee, Commission or Board and 10 days for City Council) not to exceed 45 days total.	This recommendation could have serious negative consequences with respect to investments where the investment is considered at a Board committee who then makes a recommendation to the full Board. This is particularly the case with respect to lost opportunity costs, the need to terminate an investment relationship and transfer assets to another investment manager.
2. The Task Force approved the Council's exemptions to the 10 day staff report rule but asked for clarification on exemption # 2 and more definitive parameters for exemption # 8 (i.e. are the items subject to "one week turnaround to Council" unlimited or can they be identified and limited?).	The Retirement Boards would appreciate an opportunity to review the exemptions and provide additional comments if warranted.
3. The Task Force recommended that descriptions of agenda items be written in clear, understandable language, and if an exception to a significant standing City policy is at issue, those policies should be listed in the description.	
4. The Task Force recommended that items of significant community interest as defined in Council Policy 6-30 may be appealed to the City Council.	
E. Outstanding Issues	
1. <i>Major Public Subsidies</i>	
2. <i>Requirements for council memorandums that provide recommendations that significantly differ from staff's recommendations.</i>	

Attachment A. Examples of Policy bodies, Ancillary Bodies, Non-Government Bodies, and Non-City Government Bodies

Examples of Policy Bodies (incomplete list):

City Council	City Boards, Commissions and Committees
SJ Redevelopment Agency Board	Council Assistants Meeting
San Jose Financing Authority	Rules and Open Government Assistants Meeting
SJ Clean Water Financing Authority	Team San Jose
San Jose Parking Authority	Community Action and Pride Grant Program
Planning Commission	Healthy Neighborhoods Venture Fund
Civil Service Commission	Bringing Everyone's Strength's Together Program
Council Salary Setting Commission	San Jose Beautiful
Council Committees	

Examples of Ancillary Bodies (incomplete list):

Mayor's Gang Prevention Task Force
Evergreen Visioning Project
Mayor-elect Reed's Transition Team and Subcommittees.

Examples of Non-Government Body (incomplete list):

Children's Discovery Museum	MACSA	Merlin San Jose
Tech Museum of Innovation	SC Family Health Plan	Project Sentinel
San Jose Museum of Art	Municipal Health Services	Kubra
San Jose Historical Museum	SJ Conservation Corps	Norcal
Mexican Heritage Corporation	Breakout Prison Outreach	Greenwaste
Repertory Theatre	MACLA	AMPCO
Theatre on San Pedro Sq.	Pathway Society, Inc.	Technology Center
American Musical Theatre	Japantown	Catholic Charities of SC County
San Jose Stage Company	Goodwill	
Korean American Community Services	San Jose Smart Start Family Child Care	

Examples of Non-City Government Body (incomplete list):

Oak Grove School District
San Jose Unified School District
Santa Clara County

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Closed Session Provisions

II. Closed Session

The Task Force has made the following recommendations:

Recommended Provision	Concerns
A. Requirements for Closed Session Agendas Description of topics must follow the discretionary provisions of the Brown Act at a minimum with other additional information required.	What additional information is contemplated?
B. Statement of Reasons for Conducting Closed Sessions In addition to the agenda requirements, a policy body that is meeting in closed session must open first in public session to explain the reasons for the closed session.	
C. Topics that are Permitted to be Discussed in Closed Session	
1. Policy bodies that are authorized to hold closed session to be specified in an ordinance and that the City provide a rationale that describes why each body needs to conduct closed session.	The Retirement Boards are authorized by the Brown Act to hold closed sessions. Additional authorization by ordinance is unnecessary.
2. Performance evaluations of Council appointees may continue to take place in closed session.	
3. Any discipline of the Council Appointees (who will be specifically listed in the ordinance) may continue to take place in closed session but the report of the discipline must be disclosed in open session.	

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4. Closed session discussions about real estate negotiations are permitted but:	
(i). May not address any subjects other than instructions from the policy body to its negotiators about the price and terms of payment (understanding that price includes a discussion on the potential use of property).	
(ii). Must first be identified in open session, specifically, the properties at issue and any development plans (within the constraints of CEQA), so that proposed development of property being considered for purchase or sale cannot be discussed in closed session.	The Retirement Boards may invest in real property by direct purchase. In some cases identification of the specific property at issue may jeopardize the investment.
(iii). All proposed agreements, after the deal is negotiated, must be approved by the policy body in open session. Notice must be 10 days for purchases that are under \$1M and 14 days for purchases over \$1M before the agreement is scheduled to be discussed in open session.	In general, when a Retirement Board invests in real property by direct purchase, the investment will exceed \$1M. A requirement that 14 days notice must be given before the purchase and sale agreement is approved may not be possible in some transactions and may result in lost opportunity costs.
(iv). In addition to limited closed session discussions about the real estate negotiations to price and terms of payment, if funds not budgeted for this purpose are to be discussed in closed session, the possible use of those funds must first be discussed in open session. The report of a closed session decision must include a full disclosure of the use of any funds not previously budgeted for that purpose, and the full disclosure of the opportunity cost of the use of those funds.	It is not clear how this applies in the context of the Retirement Boards. The Boards have adopted asset allocation policies which include the target for real estate investments. When an investment opportunity arises, the Boards will move funds from one asset class to the real estate class in accordance with the asset allocation policy. Is it contemplated that this procedure is subject to this requirement?

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<p>5. Closed session discussions about litigation are permitted but all proposed settlements \$50,000 or more must be approved by the policy body in open session. Notice must be 10 days for settlements that are under \$1M and 14 days for settlements over \$1M before the agreement is scheduled to be discussed in open session.</p>	<p>This can be problematic for the Retirement Boards because they only meet on a monthly basis. This would mean that a settlement for \$50,000 or more could not become effective for at least a month after the proposed settlement has been approved in closed session.</p>
<p>6. Closed session discussions on labor negotiations are permitted but:</p>	
<p>(i). An early public involvement process will be conducted, such as a study session, to provide an opportunity for the public to ask questions and provide input. The process will be conducted at a time that provides a meaningful opportunity for the public to participate in the process.</p>	
<p>(ii). All proposed contracts with represented and unrepresented employees and the Council appointees must be approved by the policy body in open session. Notice must be 10 days for contracts that are under \$1 million, and 14 days for contracts over \$1 million before the contract is scheduled to be discussed in open session</p>	
<p>D. Additional Requirements for Closed Session. All closed sessions of any policy body must be audio recorded in their entirety.</p>	<p>The proposal that closed sessions be audio recorded and potentially be made public will inhibit the free and candid discussion of the issues. In addition, the Retirement Boards meet in closed session on a very limited basis to discuss sensitive medical reports submitted by applicants for disability retirement. It is recommended these closed sessions not be subject to the recording rule.</p>

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1. Audio recording real estate negotiations.	Release of information about closed sessions held in connection with real estate negotiations may reveal negotiation strategies that may be pertinent in a future negotiation and provide an advantage to the other party.
2. Audio recording discussions about litigation.	Release of information about closed sessions held in connection with litigation may reveal litigation or settlement strategies that may be pertinent in a future situation thus providing an advantage to the other party in the litigation.
3. Audio recording labor negotiations.	
E. OUTSTANDING ISSUES	
1. Topics that are Permitted to be Discussed in Closed Session <i>Labor Agreements - The Task Force has referred, for legal analysis, its recommendations on labor negotiations to the Attorney's Office, and an external labor law attorney.</i>	
2. Disclosing Closed Session Discussions and Actions	
<i>(i). The Closed Session Committee recommended a procedure for disclosure of closed session recordings. The default is that the recording is made available unless the City Attorney "certifies" that the recording should not be disclosed. If certified, the City Attorney must state (1) the reason why non-disclosure is in the public interest and (2) when the need for non-disclosure will no longer exist.</i>	This procedure is of concern to the Boards. For example, closed session materials relating to sensitive medical information should not be released. In the unusual case where the closed session is for the purpose discussing litigation between the City and a Board, it would be inappropriate for the City Attorney to have access to this information.

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<p>(ii). <i>The Closed Session Committee recommended that appeals of the City Attorney's certification of closed session recordings be made to three retired judges. One judge would be selected by the City Council and one judge would be selected by the Sunshine Ordinance Commission. These two judges would select the third judge.</i></p>	<p>This recommendation is of concern to the Retirement Boards particularly with respect to sensitive medical information submitted in connection with disability retirement applications. What rights would the disability retirement applicant have in connection with such appeals? Would the applicant's medical information be disclosed to the judges? If the information is ordered released in violation of the applicant's constitutional right to privacy or in violation of requirements of the Health Information Portability and Accountability Act or other statutory requirement, what recourse will there be? If the ordered release exposes the Board to liability, what indemnification will be provided to protect the trust funds or to protect the members of the Board if it is alleged the release is a violation of the Board's fiduciary duty to the applicant?</p>
<p>(iii). <i>A member of the Task Force has recommended that there be a written summary of the disclosures made in open session. The Task Force as a whole has not agreed with this recommendation.</i></p>	
<p><u>3. Additional Requirements for Closed Session.</u> <i>The Closed Session Committee recommends: 1) all closed session recordings are confidential unless and until they are made available as provided in this section, and 2) all recordings must be retained for at least 5 years from the date disclosure is required; or (2) certification of non-disclosure is permitted.</i></p>	<p>In the absence of state law on the issue, the determination as to the length of time records must be maintained is a matter that should be determined by the Boards.</p>

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III. Public Information	
<p>B. Release of Oral Information</p> <p>This section reflects the City's current practice.</p> <ol style="list-style-type: none">1. Each Department is required to assign a records coordinator to answer questions about the Department's operations, plans, policies, and positions.2. Public employees would not be discouraged from or disciplined for expressing their personal opinion as long as they do not represent their opinion as that of the Department or City.	
<p>B. Public Review File</p> <p>The section generally reflects the current city practice but centralizes record keeping for an expanded list of Policy Bodies.</p> <ol style="list-style-type: none">1. The City Clerk is required to maintain a file containing correspondence from or to all of the City's policy bodies. Attachment A provides an expanded list of policy bodies.2. Department's are also required to maintain correspondence files that are available for public review.	<ol style="list-style-type: none">1. The Secretary to the Retirement Boards is the Director of Retirement Services. Correspondence submitted to the Boards is maintained by the Director. Requiring the City Clerk to maintain these records is an unnecessary duplication of effort. If this relates to electronic records, it would be more appropriate for the Clerk's website to contain a link to the Retirement website.2. Some correspondence, such as medical reports submitted in connection with a disability retirement application, is confidential. It would be inappropriate for this correspondence to be available for public review.

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C. Calendar Disclosures

This section recommends changes to the City's current practices regarding the disclosure of calendars for City officials. It identifies the City officials that must maintain a calendar, what information should be included on the calendar, and which of those calendars should be posted on the City's website,

Key changes from the City's current practice are:

1. The individuals required to post their calendars online currently applies only to the Mayor and City Councilmembers. Under this recommendation, four Council Appointees (excluding the Independent Police Auditor and City Auditor) would also be required to post calendars. In addition, the number of individuals required to maintain a calendar would expand to include: 1) Chiefs of Staff for elected officials, and; 2) Department/Office Directors (other than Employee Relations Director and Human Relations Director).
2. The frequency of posting the calendars of elected officials would change from quarterly to every Monday at noon covering the previous 7-days.
3. Content – For meetings not otherwise publicly noticed and recorded, the calendar shall include a general statement of issues being discussed. In addition, the Task Force recommendation provides the following guidance in determining when an unscheduled meeting should be included on a calendar: *Public Officials are encouraged to record contacts of a material nature on matters coming before a policy body for consideration. If a public official meets with someone, and it impacts their decision the meeting should be considered material.*
4. Exceptions – The Task Force recommendation for personal activities that can be excluded reflects the City's current practice. The Task

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<p>Force added additional exceptions: 1) Attorney Client Privilege; 2) Private or Proprietary City Business including: a) Personnel and Recruitment Matters; and, b) Economic Development Matters; 3) Whistle-Blowers; and, 4) Meetings with Individuals Fearing Retaliation.</p>	
<p>D. Lobbyists on Behalf of the City</p> <p>This language refers to individuals or organizations that lobby in Sacramento or Washington, DC on behalf of the City. It would require individuals or organizations to report expenditures quarterly that advance lobbying efforts on behalf of the City. The information required in each report appears to be consistent with what is currently mandated, but more frequent reporting would be required.</p> <ol style="list-style-type: none"> 1. Patton Boggs, the City's lobbyist in Washington, DC, is currently required to file reports every six months with the clerks of the House and Senate. The proposed language would require quarterly reports to be filed, and copies would be available through the City Clerk's office. 2. Currently Roxanne Miller, our Sacramento lobbyist, is required to file quarterly reports detailing her activities on behalf of the City. The proposed changes would exempt her from new reporting requirements since she is a City employee. 	
<p>E. Additional Public Outreach</p> <p>This section reflects the City's current practice on outreach for land use/development proposals and public capital projects. This section also recommends an outreach policy be established for citywide initiatives that have a significant Citywide impact. The new policy will provide a similar detail of guidance as the City's private development and land use proposals (Policy 6-30).</p>	<p>It is not clear to what extent these recommendations would apply to the Boards. The Boards would like an opportunity to comment when a more detailed recommendation is available.</p>

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Key recommendations include:

1. Include by reference, current City practice related to: 1) Policy 6-30 *Public Outreach for Land Use/Development Proposal* which establishes a range of outreach efforts depending on the size of a land use proposal, and 2) outreach for capital projects (CIP Outreach Policy; Council Policy 5-6-Traffic Calming; and Outreach Policy for Parks, Recreation & Neighborhood Services).
2. While the existing policies adequately address projects and proposals that impact a specific geographic location within the City, an additional policy should be created to address City-initiated policy actions that have a significant citywide impact. The Policy would require a community engagement process to be conducted when any City Department or Office is initiating a planning process that would have significant citywide impact or lead to a change in citywide service levels such as a Master Planning Process and the Annual Budget Process. The process would replicate the most extensive outreach requirements contained in Policy 6-30 and would be required to be applied consistently across all City departments.